No. 09-1500

Supreme Court, U.S.
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In The
Supreme Court of the United States

CHARLES MADU MOMAH,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant who, for tactical reasons, invites a state trial court to conduct *voir dire* of certain jurors outside the public courtroom should be foreclosed from asking on appeal that his conviction be reversed because the trial court accepted the invitation to effectively close the courtroom?

2. Whether the state supreme court properly found that a *de facto* courtroom closure was not structural error where the closure was advocated by the defendant and adopted by the state trial court because it protected the defendant's interests, allowed more effective *voir dire*, and ensured that a fair and impartial jury was selected.

LIST OF PARTIES

Petitioner:

Charles Madu Momah

Respondent:

The State of Washington

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The opinion of the Washington Supreme Court is attached to Momah's petition for writ of certiorari. Pet. App. at 1-32. The opinion of the Washington Court of Appeals is also attached to Momah's petition. Pet. App. at 34-68.

JURISDICTION

Jurisdiction is asserted by Petitioner pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The facts of Momah's crimes are adequately set forth in the opinion of the Washington Court of Appeals. Pet. App. at 34-36. Momah was charged with the crimes of Rape in the Third Degree in Count I, Indecent Liberties in Count II, Indecent Liberties in Count III, and Rape in the Second Degree in Count IV. No appellate court has questioned the jury's finding that Momah was guilty of multiple counts of sexual assault of women whom he treated as a physician.

A. Facts Relevant to Jury Selection

Preparing for and conducting *voir dire* in Momah's trial spanned five court days, as follows: Thursday, October 6 (discussion of jury logistics);

Monday, October 10 (questioning of entire panel for "hardship" exemptions to service); Tuesday, October 11 (questioning of a select group of jurors in chambers); Wednesday, October 12 (*voir dire* of entire *venire*); Thursday, October 13 (finished *voir dire*). Each day except Tuesday, October 11, *voir dire* was conducted in open court. A more detailed account is provided below.

On the second day of trial, Thursday, October 6, 2005, during pretrial motions, defense counsel signaled that he desired juror confidentiality. Counsel presented a proposed confidential jury questionnaire that was ultimately adopted by the court. *See* 10/6/05 TR:67; 10/10/05 TR:5. Defense counsel at one point encouraged the court to *seal* the questionnaires, saying, " . . . I would think that there would be exceptions to releasing those, given privacy. I know that courts oftentimes keep juror information confidential." 10/6/05 TR:75.

That same day, in response to the court's inquiry about press coverage, defense counsel objected to television coverage of *voir dire*. 10/6/05 TR:93 ("I would very much object to jury selection being televised"). The prosecutor replied that under case law and court rules, jury selection was open to the public. 10/6/05 TR:93-94 (prosecutor specifically citing *State v. Brightman*, 122 P.3d 150 (Wash. 2005) and Wash. General Rule 16). The court added that "the presumption is all proceedings are open." 10/6/05 TR:94. Ultimately, the television station did not request permission to cover *voir dire*.

More than 100 jurors were randomly selected for the *venire*. Jury selection was conducted in the presiding courtroom, the only room in the King County Courthouse large enough to accommodate the large *venire*.

Also on Thursday, October 6, several days before active questioning of potential jurors, there was discussion among all counsel and the court about how to accomplish *voir dire* with such a large number of prospective jurors. 10/6/05 TR:80-86.[1] After weighing options, the court decided that the best approach would be to leave the large group of jurors in the courtroom and to question jurors individually in chambers behind the courtroom. 10/6/05 TR:81-82. Likely because it was consistent with his overall approach to *voir dire*, defense counsel did not object to the court's decision.

The following court day, Monday, October 10, was devoted to administration of the confidential questionnaire and to vetting hardship challenges. 10/10/05 TR:10-18 (questionnaires), 78-156 (hardships). Although in-chambers questioning was discussed again, defense counsel said nothing to discourage this approach. 10/10/05 TR:4-7.

[1] Momah erroneously claims that questioning of jurors in a closed room was discussed "for the first time" on October 11. Pet. at 7. As indicated here, the parties discussed conducting *voir dire* in chambers five days before October 11.

On Tuesday, October 11, the parties reconvened in the presiding courtroom. 10/11/05 TR:1. The court noted that eight jurors had asked in their questionnaires for private questioning and eight more jurors indicated they could not be fair. 10/11/05 TR:2-3. A list of jurors to be individually questioned was discussed at great length. 10/11/05 TR:5-8, 17-20. The 36 jurors in this group identified for individual questioning had either asked for private questioning or could not be fair for some reason. 10/11/05 TR:3-5, 7-8, 27. Defense counsel said, "I would agree with the prosecutor's list." 10/11/05 TR:6.

Defense counsel was also twice asked to comment on the proposed procedure of individual questioning of this group. 10/11/05 TR:4, 8. First, he asked to expand the private questioning to include jurors who expressed an inability to be fair or who had prior knowledge of the case. *Id.* ("It is our position and hope that the court will take *everybody* individually.") (italics added). The court then re-confirmed its earlier-stated plan to question jurors in chambers and added that for-cause challenges would be taken in open court, rather than in chambers. Defense counsel replied that his "only question" had to do with the manner of taking for-cause challenges. 10/11/05 TR:8. Ultimately, the parties and the court agreed that 20 jurors were to be questioned in the morning and 11 were to be questioned in the afternoon. 10/11/05 TR:17-19. Once in-chambers questioning began, the record shows that the court and defense counsel actively questioned 13 jurors before lunch

in chambers and four jurors in a jury room in the afternoon, outside the actual courtroom. 10/11/05 TR:19-104, 106-142.

On Wednesday, October 12, the overall number of *venire* members had dwindled so individual questioning of six jurors occurred in the open public courtroom, not the jury room. 10/12/05 TR:11-12. After lunch, the court noted that 15 jurors wanted individual questioning or said they could not be fair. 10/12/05 TR:75-77. This questioning was to occur in open court, but defense counsel suggested that one juror be questioned privately, not publicly, even though the juror did not request private questioning.

> MR. ALLEN: There is one more we should, just in an ounce of precaution, take *privately*, 141, who on page 1 says that he was molested – he or she was molested as a child. There is no request that this be done *privately*. But I am concerned about asking those questions *publicly*.

10/12/05 TR:77 (italics added). The court denied the request. *Id.*

The rest of *voir dire* and the trial were conducted in open court and Momah was convicted as charged. On February 6, 2006, the court imposed judgment and sentence. Pet. App. 69-82.

B. Appellate Decisions

Momah appealed and argued that the trial court violated his right to a public trial when it conducted a portion of *voir dire* outside the courtroom. He made no claim under the First Amendment. The Court of Appeals rejected his argument, holding that Momah had failed to establish that the trial court closed proceedings, because the trial court did not order closure and nobody was *de facto* prevented from attending *voir dire*. *State v. Momah*, 171 P.3d 1064 (Wash. App. 2007).

The Washington Supreme Court granted review of the Court of Appeals decision and considered the case together with a similar case, *State v. Strode*, 217 P.3d 310 (Wash. 2009). Oral argument was heard on the same day and decisions were filed in each case on the same day. The *Strode* decision cross-references *Momah* in detailed respects.[2]

In *Momah*, the Washington Supreme Court focused extensively on the degree to which defense counsel had made a deliberate choice to conduct private questioning. It found:

> Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from

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[2] Momah has not cited or discussed the *Strode* case in his petition for certiorari.

> the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

Pet. App. at 11. In essence, the court determined that it was clear – from Momah's strategic positions at trial and the court's inquiry and rulings – that the constitutionally required inquiry was satisfied, although a more express application of the relevant factors was recommended. Pet. App. at 16, n.2. The state supreme court also found that:

> From the outset of trial, we presume Momah made tactical choices to achieve what he perceived as the fairest result. Before in-chambers *voir dire* began, defense counsel, the prosecution, and the judge discussed numerous proposals concerning the juror selection. . . . Although Momah was provided the opportunity to object to the in-chambers proposal, he never objected. Further, he gave no indication that a closed *voir dire* might violate his right to public trial. To the contrary, defense counsel made a deliberate choice to pursue in-chambers *voir dire* to avoid "contamination" of the jury pool by jurors with prior knowledge of Momah's case. Defense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning. As a result of this closure and defense counsel's active

> participation in the questioning, Momah was able to exercise numerous challenges for cause, removing biased and partial jurors from the *venire*. We find all of these actions by Momah's counsel and the trial judge occurred in order to promote and safeguard the right to an impartial jury.

Pet. App. at 16. Based on the entire record, including defense counsel's desire for closure and the trial court's inquiry into closure and the basis for its rulings, the state supreme court found that structural error had not occurred:

> As we stated above, courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.
>
> We hold the closure in this case was not a structural error. The closure occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case. The record also demonstrates that the trial court recognized the competing article I, section 22 [of the Washington Constitution] interests in this case. The court, in consultation with the

> defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial. Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it. Thus, the underlying facts and impact of the closure in Momah are significantly different from those presented by our previous cases. Reversal of Momah's conviction and remand of his case cannot be the remedy under these circumstances. We affirm the jury's determination of guilt.

Pet. App. at 16-17.

Significantly, in *Strode*, the companion case before the Washington Supreme Court, the state supreme court determined that because Strode had not invited closure, because the trial court made no meaningful inquiry into the reasons for closure, and because there was no record on which to assess the propriety of closure, private inquiry of jurors was structural error that required automatic reversal. *Strode*, 217 P.3d at 313-16. Two concurring justices explained in great detail the differences between the cases, in particular that Momah had invited closure whereas Strode had simply failed to object to closure. *Id.* at 318-19 (Fairhurst, J., concurring).

Momah sought reconsideration of the state supreme court decision on two factual questions: (1) that the record did not support the court's findings of invited error, and (2) that the record did not support the court's finding that Momah benefited from private inquiry of jurors. Momah also sought reconsideration claiming that structural error occurred and is *per se* reversible. The motion for reconsideration was denied.

REASONS THE PETITION SHOULD BE DENIED

Momah asks this Court to grant certiorari and reverse his convictions because the state trial court questioned some jurors behind closed doors about sensitive topics in a sexual abuse trial. Momah fails to acknowledge, however, that he did not simply fail to object to the questioning of these jurors. Rather, Momah urged the trial court to implement the very method of *voir dire* that the court employed, and he vigorously pursued questioning of jurors in chambers in an effort to seat a jury that would fairly decide his case. The Washington Supreme Court properly applied the invited error doctrine and refused to grant him a new trial under these circumstances, observing that he had clearly assented to the court's procedure in an effort to secure his right to a fair trial. Moreover, the court found that the trial court's pre-closure inquiry was sufficient, especially in light of counsel's

tactical pursuit of private *voir dire*, so there was no structural error.

The State of Washington respectfully asks this Court to deny certiorari because Momah plainly invited the error he asserts in his petition. This Court would not even consider a claim like the petitioner's – invited and used for his own gain at trial – in a federal appeal. Further, there is no controversy among the appellate courts on this issue. There is simply no room on this Court's crowded docket to review invited error.

Moreover, Momah's claim that the Washington Supreme Court misunderstood the doctrine of structural error is belied by the holding in *Momah* itself and by the holding in *State v. Strode*, the companion case argued and decided with Momah's case. Although Momah fails to even mention *Strode* in his petition for certiorari, the Washington Supreme Court held that a similar closed *voir dire* proceeding was structural error that required automatic reversal for retrial. Thus, contrary to Momah's contention, the Washington Supreme Court has not adopted a rule that structural errors can be harmless; the court simply found no structural error under the circumstances. Moreover, no other appellate court – state or federal – has committed the error that Momah alleges the Washington Supreme Court committed. Certiorari is simply not warranted.

A. MOMAH'S CONVICTIONS WERE AFFIRMED BECAUSE HE INVITED ERROR; THERE IS NO SPLIT OF AUTHORITY ON WHETHER AN INVITED ERROR SHOULD BE REVIEWED ON APPEAL.

Momah mischaracterizes the state supreme court's decision as a case of "failure to object" or "silence" in the face of a courtroom closure, and then announces that there is a split between federal appellate circuits and state supreme courts on whether a closed courtroom claim can be raised for the first time on appeal absent a contemporaneous trial objection. Pet. at 19. But Momah misrepresents the factual conclusion of the Washington Supreme Court, and he ignores an important companion case. His arguments for certiorari on the issue of mere "silence" are simply inapposite. Momah's conviction was affirmed because he invited questioning of jurors behind closed doors, not because he simply failed to object to such questioning. This point is illustrated by the express language of the *Momah* decision set forth above. Pet. App. at 11, 16-17.

This point is also starkly apparent when *Momah* is contrasted with *State v. Strode*, the companion case argued and decided together with *Momah*. In *Strode*, the court held that review and reversal was appropriate because Strode's courtroom was closed. The court noted reversal was appropriate even though counsel had not made a contemporaneous trial objection.

Strode, 217 P.3d at 313-16. The concurring opinion fully explained, however, that the court reached different results in *Strode* and *Momah* because Momah invited error, whereas Strode simply failed to object. *Id.* at 318-19 (Fairhurst, J., concurring).

The record fully supports these findings. Momah proposed a confidential jury questionnaire, he asked that the questionnaire be sealed, he opposed televising *voir dire*, he agreed when the court decided to question a small group of jurors in a jury room adjacent to the courtroom, he argued that the group questioned privately should be larger, and he actively participated in this private questioning process. Even after the *venire* was reduced in size and questioning was being conducted in open court, Momah asked the court to return to private, not public, questioning of an additional juror who had not even requested privacy. There is no question that Momah encouraged and fully participated in the private questioning that he now challenges.

This contrast between *Momah* and *Strode* was readily apparent to Momah in the Washington State Supreme Court. In fact, he argued strenuously in a motion for reconsideration to the state supreme court that there was no factual basis for concluding he had invited error, but he certainly recognized that the Washington Supreme Court had *found* such a difference. Momah argued:

> There is no principled distinction between *Strode* and *Momah*. . . . This Court, however,

> stated that there was one big one: Dr. Momah's affirmative request for courtroom closure and the judge's decision to grant it to avoid jury contamination due to the enormous amount of publicity surrounding the case: "Momah affirmatively assented to the closure, (and) argued for its expansion." *State v. Momah*, 2009 Wash. LEXIS 967 at *12. "(D)efense counsel made a deliberate choice to pursue in-chambers *voir dire* to avoid 'contamination' of the jury pool by jurors with prior knowledge of Momah's case." Id., 2009 Wash. LEXIS 967 at *19. "Defense counsel affirmatively assented to . . . and even argued for the expansion of in-chambers questioning." Id., 2009 Wash. LEXIS 967 at *2. . . . The record flatly contradicts these assertions.

Motion to Reconsider at 2-3. Thus, Momah recognized in state court that the Washington Supreme Court's decision did not rest on the simple failure to object. In his petition for certiorari he simply ignores this distinction – and fails to cite the *Strode* decision at all.

These shortcomings should be fatal to his petition. This Court has consistently held that constitutional rights are not self-executing. *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal . . . cases by the failure to make timely assertion of the right"). Even structural errors can be forfeited.

Freytag v. Comm'r, 501 U.S. 868, 896 (1991) (". . . if the litigant does not assert [it] in a timely fashion, he is foreclosed.") (Scalia, J., concurring). *See also Peretz v. United States*, 501 U.S. 923, 936 (1991) ("[t]he most basic rights of criminal defendants are . . . subject to waiver."). This Court has applied this principle to open courtroom claims under the Sixth Amendment. *Levine v. United States*, 362 U.S. 610, 619 (1960); *Waller v. Georgia*, 467 U.S. 39, 42 n.2 (1984). This Court has also held that First Amendment claims may be forfeited. *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 432-33 n.12 (1963). The rationale for rules of forfeiture is well-known:

> If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *United States v. Padilla*, 415 F.3d 211, 224 (C.A.1 2005) (en banc) (Boudin, C. J., concurring).
>
> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or

> invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court -- remaining silent about his objection and belatedly raising the error only if the *case does not conclude in his favor. Cf. Wainwright v. Sykes*, 433 U.S. 72, 89 (1977); *see also United States v. Vonn*, 535 U.S. 55, 72 (2002).

Puckett v. U.S., 129 S.Ct. 1423, 1428-29 (2009).

Although there may be some question as to whether structural errors automatically satisfy the third prong of the plain-error test, *Puckett v. U.S.*, 129 S.Ct. at 1432, the plain-error test stems from a federal rule of procedure that applies only in federal courts, and only where a defendant has been silent in the federal trial court. Here, Momah invited error as opposed to simply letting it occur, and this Court has *never* suggested that an invited error may be raised for the first time on appeal. There is no split of authority on this question.

Finally, it is questionable whether this court has jurisdiction because the Washington Supreme Court's decision rests on adequate and independent state grounds. *See* E. Gressman, K. Geller, S. Shapiro, T. Bishop & E. Hartnett, *Supreme Court Practice*, ch. 3.26, p. 222 (9th ed.2007).

This Court has held that preservation of error is a matter of state law, not federal law.

Waller v. Georgia, 467 U.S. at 42 n.2.[3] Washington has an unusually liberal rule allowing consideration of constitutional issues raised for the first time on appeal. *See* RAP 2.5(a). But even that rule is limited by invited error. Whether the unusual facts of this case constitute "invited error" is an issue of State law, not Federal law.

Moreover, the underlying analysis of the Washington Supreme Court was closely tied to uniquely state constitutional issues.

> This case asks us to determine whether a defendant's constitutional right to a public trial under article I, section 22 was violated when the court closed a portion of voir dire to safeguard the defendant's right to a trial by an impartial jury. While our previous article I, section 22 cases have focused on the defendant's right to a public trial, this case implicates both the right to a public trial and the right to an impartial jury. Here, we find the trial court, in consultation with the defense and the prosecution, carefully considered the

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[3] Momah claims that in *Waller*, this Court applied a rule of automatic reversal even as to claims not raised in the trial court because this Court "granted relief" to all Petitioners. Pet. at 20 (citing *Waller*, 467 U.S. at 42, n.2). But footnote 2 makes clear that Petitioners Waller, Thompson, Eula Burke and W.B. Burke were entitled to relief, i.e., a new suppression hearing because the first suppression hearing was closed over their objection. Petitioner Cole could be procedurally barred under Georgia law because he had asked for a closed hearing. Thus, footnote 2 undercuts rather than supports Momah's claim.

> defendant's article I, section 22 rights, closed the courtroom to preserve his right to an impartial jury, and narrowly tailored the closure to secure that right. We hold that the closure was not a structural error and affirm Charles Momah's conviction.

Pet. App. at 2.

Both the procedural bars and state constitutional aspects of the Washington Supreme Court's decision illustrate that it rests on adequate and independent state grounds. This Court does not have jurisdiction to consider Momah's case.

For these reasons, Momah's petition for certiorari on the question of preservation of error should be rejected.

B. THE WASHINGTON SUPREME COURT FOUND NO STRUCTURAL ERROR; IT DID NOT FIND THAT STRUCTURAL ERROR WAS HARMLESS, AS MOMAH CLAIMS.

Momah misconstrues the Washington Supreme Court's decision as to structural error. The court held that the trial court effectively conducted the requisite inquiry before questioning jurors in private and that no structural error occurred. Pet. App. at 11, 17. That holding is supported by the record, insofar as the state supreme court found that the trial court's reasons for closure were clear – to secure the defendant a fair trial in the least restrictive manner possible – and especially in light of defense counsel's

tactical maneuvering that assured private inquiry of the jurors.[4]

Moreover, in the companion case of *State v. Strode*, the Washington Supreme Court clearly articulated and applied the usual rule: that absent a procedural bar to review, error in closing a courtroom is structural and mandates reversal of the conviction. *Strode*, 217 P.3d at 313-16. Momah does not cite to even one decision from any other appellate jurisdiction where a court has held that structural error may be harmless. There is simply no split of authority on this question, and the Washington Supreme Court properly understood and applied the law on this issue. A decision by this Court in this case will not assist other appellate courts because the decision here is wholly driven by the unique facts of the case.

CONCLUSION

Momah ignores the fact that the Washington State Supreme Court denied relief to Momah largely because he invited, acquiesced in, and benefited from

[4] The Washington Supreme Court's decision comports with this Court's recent decision in *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721 (2010), in which the Court stated: "While the accused does have a right to insist that the *voir dire* of the jurors be public, there are exceptions to this general rule. '[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial . . .'" *Presley*, 130 S.Ct. at 724 (quoting *Waller*, 467 U.S. at 45).

an erroneous procedure that he now says requires an automatic new trial. No court should countenance the pernicious practice of encouraging a trial court to adopt a procedure and then claiming on appeal that the procedure is reversible constitutional error. Moreover, the Washington Supreme Court did not find structural error because the record was sufficient to conclude that closure was warranted, especially in light of defense counsel's deliberate tactic to attempt to secure closure. The Washington Supreme Court is not confused as to whether structural error must result in automatic reversal based on a preserved error. Certiorari should be denied.

Respectfully submitted,

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